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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. **77-786**

JEROME E. MOORE, *Petitioner*

v.

RICHMOND, FREDERICKSBURG AND
POTOMAC RAILROAD

PETITION FOR WRIT OF CERTIORARI

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Of Counsel:

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. _____

JEROME E. MOORE , Petitioner

v.

RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JEROME E. MOORE, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on June 13, 1977.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 13, 1977. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

Whether there has been discrimination because of race in the discharging of a black employee for violation of employer rules where a white employee who violated the same rules was not discharged.

STATUTES INVOLVED

This action is brought to enforce the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e - et seq., as amended by the Equal Employment Opportunity Act of 1972.

STATEMENT OF THE CASE

This case originated in the United States District Court for the Eastern District of Virginia which, by order dated July 9, 1976 denied relief under Title VII of the Civil Rights Act of 1964, as amended, to Petitioner, who had been discharged by the Richmond, Fredericksburg and Potomac Railroad allegedly because of his race, the Court finding that "race played no part in the plaintiff's discharge".

Petitioner (black) was employed by the Richmond, Fredericksburg and Potomac Railroad as a car repairman-helper until March 24, 1972 when he was discharged after being taken into custody by the F.B.I. the night before in connection with a theft of whiskey from appellee. Subsequently, after a hearing, Petitioner was not criminally prosecuted.

Another employee (white) was similarly apprehended and found to have violated the same regulations as Petitioner. He was suspended for a period of time (twenty-

nine days). This was the extent of his treatment--he was not discharged.

Petitioner claims that he was racially discriminated against by being discharged and argues that the failure to discharge the other employee evidences this discriminatory intent.

REASON FOR GRANTING

The decisions of the lower courts are in conflict with the principle of McDonald v. SantaFe Trail Transportation Co., 96 S. Ct. 2574 (1976) that where employees of different races are involved in a theft, the discharge of one, and not the other without adequate justification, is a prima facie case of discrimination. "While SantaFe may decide that participation in a theft of cargo may render an employee unqualified for employment, this criterion must be 'applied alike to members of all races' and Title VII is violated if, as petitioners allege, it was not" Id. at 2579-80. The facts in this case are remarkably similar to those in McDonald. The Richmond, Fredericksburg and Potomac's explanation does not meet the test of McDonald--it is not a reasonable explanation--rather it avoids explaining at all and the acceptance of it by District Court is error. Such type of error, in discrimination cases, flaunts

existing principles and sets a dangerous precedent--in effect the Court is requested to exercise its supervision powers to cure this misapplication of the law.

CONCLUSION

Richmond, Fredericksburg and Potomac's explanation of its treatment of employee similarly situated to Petitioner found to be an acceptable explanation by the lower courts for treating him differently from Petitioner though they had both violated the same employer rules, is unreasonable and the rulings of the lower courts should be reversed to avoid a travesty of justice.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

John M. Wells
Counsel for Petitioner

APPENDIX

United States Court of Appeals
For The Fourth Circuit

No. 76-1952

JEROME E. MOORE,

Plaintiff-Appellant,

v.

RICHMOND, FREDERICKSBURG AND
POTOMAC RAILROAD CO.,

Defendant-Appellee.

Appeal from United States District Court for
the Eastern District of Virginia. Oren Lewis,
District Judge.

Argued May 2, 1977. Decided June 13, 1977

Before WINTER and MOORE,* Circuit Judges, and
THOMSEN,** District Judge.

Robert B. Fitzpatrick (Geoffrey Judd Vitt,
Cohen, Vitt and Annand on brief) for Appel-
lant; Elizabeth L. Lewis (E. Waller Dudley,
Boothe, Prichard & Dudley on brief) for
Appellee.

PER CURIAM:

Jerome E. Moore brought this action in the District Court for the Eastern District of Virginia, Alexandria Division, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. &2000(e) et seq., alleging that he was discriminatorily discharged on account of his race by the Richmond, Fredericksburg and Potomac Railroad Co. ("RF&P"). The district court determined after trial that "(r)ace played no part in the plaintiff's discharge" and accordingly denied all relief. We agree with this determination and affirm the dismissal of the action.

Moore, Aubrey Marshall, Theodore Lomax, and Brayton Clemons were apprehended by the FBI on the night of March 24, 1972 after a theft from their employer, Richmond, Fredericksburg and Potomac. Moore, Lomax, and Clemons were charged with participation in the theft, but Marshall was not charged and was released that night. On April 6, 1972, the FBI arrested a fifth employee, Floyd Brown, and charged him also with participation in the March 24 theft. Moore and Lomax are black; Marshall, Clemons, and Brown are white. The four employees who were charged had all previously been under surveillance by the FBI because of informant

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- * Hon. Leonard P. Moore, United States Circuit Judge for the Second Circuit, sitting by designation.
- ** Hon. Roszel C. Thomsen, United States District Judge for the District of Maryland, sitting by designation.
-

The Judge did not dismiss the present case on the pleadings; rather, he determined after a trial that Moore's discharge was not racially motivated. There was ample evidence to support this determination. Employees Moore and Marshall were not similarly situated. Criminal charges had been brought against the one, but not the other. The FBI had informant information as to Moore, but not as to Marshall. More importantly, Moore and Marshall were not given significantly unequal treatment. They were both discharged, the only difference being that Marshall's discharge was preceded by a 29-day suspension. The reason for this minor difference in treatment was amply explained by the Richmond, Fredericksburg and Potomac Superintendent who testified at the trial. The district court's determination that this explanation was valid and was not a cover-up for a racially-motivated decision is reinforced by the fact that Moore and Brown, another white employee, received identical treatment.

We conclude that Moore's discharge was not racially motivated, and thus affirm the dismissal of his Title VII action.

information that they had been involved in earlier thefts. The charges were subsequently dropped against Moore; Lomax and Clemons were convicted after trial; Brown was acquitted.

Richmond, Fredericksburg and Potomac charged all five employees with violating company rules and held hearings on the charges against each employee. At the close of the hearings, Moore, Lomax, Clemons, and Brown were discharged. Marshall was suspended for 29 days and discharged.

On August 18, 1975, Moore brought this action against his former employer, alleging that he had been discriminatorily discharged on account of his race. He sought reinstatement and back pay. The gravamen of his complaint was that he had been discharged for the theft whereas Marshall, a similarly situated white man, had merely been suspended.

At the trial, a Richmond, Fredericksburg and Potomac Superintendent testified as to the rationale behind the handling of Marshall's case. Marshall had been charged not only with the March 24 theft, but also with other violations of company rules in connection with a subsequent incident. The 29-day suspension allowed time to place all of the violations on Marshall's record and thus strengthen the

case against him in case he appealed his discharge to the National Railroad Adjustment Board.

Moore argues on appeal that the unequal treatment of Marshall and himself is indistinguishable from the unequal treatment which the Supreme Court found violative of Title VII in McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976). In McDonald, however, the district court had dismissed the complaint on the pleadings. Thus, in reviewing the dismissal, the Supreme Court took all of the plaintiffs' allegations to be true. It summarized the allegations as follows:

"Fairly read, the complaint asserted that petitioners were discharged for their alleged participation in a misappropriation of cargo entrusted to Santa Fe, but that a fellow employee, likewise implicated, was not so disciplined, and that the reason for the discrepancy in discipline was that the favored employee is Negro while petitioners are white." 427 U.S. at 282-283."

If those allegations were true, the Supreme Court held, then Title VII had been violated. Thus, the Court determined that the district court had erred in dismissing the complaint for failure to state a claim, and remanded the case for further proceedings.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

JEROME E. MOORE, :
Plaintiff :
v. : Civil Action No.
RICHMOND, FREDERICKSBURG & : 75-599-A
POTOMAC RAILROAD COMPANY, :
Defendant :

MEMORANDUM OPINION AND ORDER

The plaintiff was discharged by the Richmond, Fredericksburg & Potomac Railroad on March 25, 1972 -- He claims racial discrimination. This Title VII (42 U.S.C. & 2000e, et seq.) suit followed.

The case was heard on stipulations, exhibits and live testimony.

From the record thus made it is clear that that Railroad was then experiencing an unusual amount of thefts from its Potomac Yard -- The F.B.I. and the railroad police had the yard and several of the railroad employees, including the plaintiff, under surveillance.

On the night of March 24, 1972 some twenty-two cases of scotch whiskey were stolen from a freight car in the Potomac Yard.

Shortly after midnight on March 25th the F.B.I. observed two automobiles departing from the Potomac Yard -- Mr. Lomax and the plaintiff were in one -- Mr. Clemons and Mr. Marshall were in the other. These automobiles appeared to be heavily loaded. They were stopped by the F.B.I. on the public highway -- Scotch whiskey was observed in the back seat of both automobiles. The drivers and passengers were then arrested, and several cases of the stolen scotch whiskey were found in the trunk of both automobiles.

The drivers and passengers of both automobiles were employees of Richmond, Fredericksburg and Potomac. All four were taken to the F.B.I. HEADQUARTERS and interrogated -- A complaint was filed against the plaintiff, Lomax and Clemons for violating 18 U.S.C. & 659 -- Marshall was not charged -- He was released that night. The plaintiff was released on bond on April 3, 1972.

All four were suspended from duty by the superintendent of the yard as of March 25, 1972 and charged with violating General Rule K of the Potomac Yard, which prohibits employees from removing anything other than personal belongings from the yard without first securing written permission from the superintendent.

Lomax and Clemons were indicted, tried and convicted in this court on or about September 12, 1972.

The Government dropped all criminal charges against the plaintiff on July 11, 1972.

Hearings were conducted by the Railroad on the Rule K charge pending against Clemons, Marshall, Lomax and the Plaintiff -- Marshall, although duly notified, failed to appear.

All four were found guilty of violating Rule K -- Lomax, Clemons and the plaintiff were discharged as of March 25, 1972 -- Marshall was suspended for twenty-nine working days from March 25th -- He had violated other railroad rules and was discharged for violating those rules.

The plaintiff did not appeal his discharge.

Floyd E. Brown, a Richmond, Fredericksburg and Potomac security officer, was arrested by the F.B.I. on April 7, 1972 and charged with participating in the theft of the aforesaid scotch whiskey -- He was immediately taken out of service. He requested a disciplinary hearing on this charge and one was conducted by the Railroad on June 5, 1972 -- He was later tried in this court on the charge brought by the F.B.I. and was acquitted.

The F.B.I. had informant information prior to the March 24th theft for which the plaintiff was arrested that he was involved in other thefts at the Potomac Yard. They had no information prior to the morning of March 25, 1972 that Marshall was involved -- The F.B.I. agent who swore out a warrant for the plaintiff's arrest stated that he had been observed by the F.B.I. as participating in the theft.

The Union that represented both Marshall and the plaintiff wrote to the superintendent and requested that Marshall be returned to service because no charges had been made against him -- The superintendent had all of this information when he discharged Lomax, Clemons and the plaintiff and suspended Marshall for some twenty-nine days.

The superintendent testified during this hearing that he had already made his decision to discharge Marshall for violating other railroad rules -- That is why he suspended him for riding in the car with the stolen scotch whiskey -- He did it that way because he felt that procedure placed the Railroad in the strongest posture should Marshall appeal to the National Railroad Adjustment Board.

There was ample evidence to support the discharge of all of the Richmond, Fredericks-

burg and Potomac employees involved in removing the scotch whiskey from the freight car in the Potomac Yard on the night in question -- All five of the railroad employees who were found to be connected in any degree with the March 24th theft were ultimately discharged by the Railroad (albeit Marshall's discharge was technically on another ground). Three of these employees are white -- Clemons, Brown and Marshall. Two are black -- Lomax and the plaintiff.

Race played no part in the plaintiff's discharge, and the Court so finds.

Therefore this suit should be dismissed at the cost of the plaintiff.

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OCTOBER 1972

No. 17-18

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IN THE
**Supreme Court
Of the United States**

OCTOBER TERM, 1977

No. 77-786

JEROME E. MOORE,

Petitioner,

v.

RICHMOND, FREDERICKSBURG AND POTOMAC
RAILROAD CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the United States District Court for the Eastern District of Virginia and the United States Court of Appeals for the Fourth Circuit were not reported. The decision of the United States District Judge is cor-

rectly set forth in the Appendix to the Petition. The per curiam opinion of the Fourth Circuit is included in the Appendix to the Petition. The per curiam opinion of the Fourth Circuit is included in the Appendix, but the pages in the opinion have been jumbled, presumably in the printing process, and accordingly, the opinion is reproduced as an Appendix to this Brief.

JURISDICTION

Jurisdiction of this Court is not conceded, it being the contention of Respondent that the Petition for Certiorari was not timely filed.

QUESTIONS PRESENTED

1. Was the Petition for Writ of Certiorari timely filed?
2. Does this case present a question which this Court should consider?
3. Are the decisions of the Courts below amply supported by the law and the evidence?

STATEMENT OF FACT ON TIMELINESS ISSUE

The judgment of the United States Court of Appeals for the Fourth Circuit was rendered on June 13, 1977. Petitioner filed nothing in this Court until November 14, 1977, one hundred and fifty-four (154) days thereafter. At that time, Petitioner filed in this Court a Motion to Extend Time For Docketing Appeal, to which was appended a proposed Petition For Writ of Certiorari. The Motion itself failed to set forth any jurisdictional grounds, nor did

it mention the judgment or judgments from which an appeal was being taken, nor did it include a copy of the decision or decisions sought to be reviewed. Neither the Motion nor the Petition was printed. Thereafter, on or about December 1, 1977, again without the permission of this Court or any Justice thereof, the Petitioner filed his printed Petition for Writ of Certiorari and an Appendix which reproduced the opinions of the Courts below.

STATEMENT OF PROCEEDINGS IN THE COURTS BELOW

Petitioner filed this action in the United States District Court for the Eastern District of Virginia, pursuant to Title VII of the Civil Rights Act of 1964. He alleged that his discharge from employment by the Respondent Richmond, Fredericksburg and Potomac Railroad Co., (RF&P) was on account of his race. RF&P answered, denying that race played any part in its decision to discharge Moore. This case was tried to the Court sitting without a jury on April 27, 1976. After hearing all the evidence, the Court found that race played no part in Moore's discharge and held that the suit should be dismissed. Moore appealed from that ruling, and on June 13, 1977 the United States Court of Appeals for the Fourth Circuit affirmed.

Petitioner Moore, along with three other men, Aubrey Marshall, Theodore Lomax and Brayton Clemons, was apprehended by the FBI in March of 1972 after a theft from the RF&P. Moore, Lomax and Clemons were charged with participation in the theft, but Marshall was not charged and was released that night. Two weeks later, a fifth employee, Floyd Brown, was arrested and charged with participation in the same incident. Moore and Lomax are black; Marshall, Clemons and Brown are white. The four employees

who were charged had all previously been under surveillance by the FBI because of informant information that they had been involved in earlier thefts. The criminal charges against Moore were eventually dropped; Lomax and Clemons were tried and convicted, and Brown was acquitted.

The RF&P itself charged all five of the men with violating company rules, and following hearings on those charges, Moore, Lomax, Clemons and Brown were discharged while Marshall was suspended for 29 days and thereafter discharged.

Moore based his charge of discrimination on the ground that he is black, whereas Marshall, a similarly situated white man, had only been suspended. The Superintendent of RF&P testified at trial that Marshall had been charged by the RF&P not only with the theft in question, but also with violations of other company rules related to a separate incident. He stated that the 29-day suspension allowed time to place all of the violations on Marshall's record and thus strengthen the case against him should he appeal his discharge to the National Railroad Adjustment Board. Additionally, he pointed out that Clemons, also a white man, had been discharged in connection with the theft charges.

ARGUMENT

I. The Petition for Writ of Certiorari Was Not Timely Filed, and Certiorari Should Not Be Granted.

Title 28, §2101(c) provides that a Writ of Certiorari must be applied for "within ninety (90) days after the entry of the judgment sought to be reviewed." It further provides that a Justice of this Court may, for good cause shown, extend that time for a period not exceeding sixty (60) days. It is provided under this Court's Rule 34(2) that

any application for an extension of time to file a Petition for Certiorari must be submitted at least ten (10) days before the expiration of the period sought to be extended and will not be granted except in the most extraordinary circumstances if filed during the last ten days of such period. Petitioner in this case filed nothing in the first ninety days. Indeed he filed nothing at all until one hundred and fifty-four (154) days after June 13, 1977. It would appear, therefore, that not only did the Petitioner fail to secure additional time from a single Justice, as required by law, but no request for additional time was filed until the time had expired to which a single Justice could have extended the ninety-day period if he had been so inclined.

Additionally, it appears that the Motion, when finally filed, failed to meet the requirements of Rule 22(4) in that it did not set out the grounds on which the jurisdiction of this Court is invoked, did not identify the judgment sought to be reviewed, and was not accompanied by a copy of the Opinion of the Court below.

Finally, the Motion was further defective because it was not printed as required by Rule 35(2), inasmuch as it was not addressed to a single Justice and was, in addition, accompanied by a supporting Brief.

II. The Courts Below Did Not Disregard Any Decision of This Court.

Petitioner contends that the decisions of the lower courts are in conflict with the principle of *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976). In deciding *McDonald*, the lower courts had held, without taking any evidence at all, that a Complaint was insufficient as a matter of law either under 42 U.S.C. 1981 or under

Title VII of the Civil Rights Act of 1964, in charging that the Defendants had unlawfully discriminated against the white plaintiffs by discharging them for certain criminal activity while retaining similarly situated black men. The Court, in reversing, held that Plaintiffs, if they could prove their contentions, were entitled to relief under either statute, and the case was remanded for the taking of testimony. In the case at bar, the District Court did not dismiss on the pleadings but took evidence and found as a fact that there had been no discriminatory conduct. There is no reason to suppose that the District Court or the Fourth Circuit ignored or improperly distinguished this Court's opinion in *McDonald*. On the contrary, the Fourth Circuit properly pointed out that the District Judge in this case did not dismiss on the pleadings but determined the issue after a trial.

III. The Decision in the Courts Below Is Amply Supported by the Evidence.

Petitioner Moore and the white employee with whom he seeks to identify, were not similarly situated. Criminal charges were brought against Moore but not against Marshall. Even more importantly, Moore and Marshall were given substantially the same treatment. Both of them were discharged, and the reasons for the delay in discharging Marshall were amply explained by the testimony. Neither was it lost on the Courts below that still another white man involved in this incident, Clemons, was promptly discharged. In short, there was ample evidence to sustain the decision of the District Judge.

CONCLUSION

Respondent respectfully urges that the Petition for Writ of Certiorari be denied for the reasons heretofore presented.

Respectfully submitted,

/s/ RICHMOND, FREDERICKSBURG AND
POTOMAC RAILROAD CO.

By:

Counsel

BOOTHE, PRICHARD & DUDLEY
711 Princess Street
Alexandria, Virginia 22313

By: */s/*

E. WALLER DUDLEY
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that two true copies of the foregoing Brief for Respondent in Opposition were mailed, postage prepaid, this 7th day of February, 1978, to John M. Wells, Esquire, 305 Franklin Street, Alexandria, Virginia 22314, and to Robert George Flick, Esquire, 1026 King Street, Alexandria, Virginia 22314, counsel for Petitioner.

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E. WALLER DUDLEY

a-i

APPENDIX

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-1952

JEROME E. MOORE,
Plaintiff-Appellant,

v.

RICHMOND, FREDERICKSBURG AND POTOMAC
RAILROAD CO.,
Defendant-Appellee.

Appeal from United States District Court for the Eastern
District of Virginia. Oren Lewis, District Judge.

Argued May 2, 1977 Decided June 13, 1977

Before WINTER and MOORE,* Circuit Judges, and
THOMSEN,** District Judge.

Robert B. Fitzpatrick (Geoffrey Judd Vitt, Cohen,
Vitt and Annand on brief) for Appellant;
Elizabeth L. Lewis (E. Waller Dudley, Boothe,
Prichard & Dudley on brief) for Appellee.

PER CURIAM:

Jerome E. Moore brought this action in the District
Court for the Eastern District of Virginia, Alexandria Di-
vision, pursuant to Title VII of the Civil Rights Act of
1964, 42 U.S.C. §2000(e) *et. seq.*, alleging that he was
discriminatorily discharged on account of his race by the
Richmond, Fredericksburg and Potomac Railroad Co.
("RF&P"). The district court determined after trial that
"[r]ace played no part in the plaintiff's discharge" and ac-

* Hon. Leonard P. Moore, United States Circuit Judge
for the Second Circuit, sitting by designation.

** Hon. Roszel C. Thomsen, United States District Judge
for the District of Maryland, sitting by designation.

cordingly denied all relief. We agree with this determination and affirm the dismissal of the action.

Moore, Aubrey Marshall, Theodore Lomax, and Brayton Clemons were apprehended by the FBI on the night of March 24, 1972 after a theft from their employer, RF&P. Moore, Lomax, Clemons were charged with participation in the theft, but Marshall was not charged and was released that night. On April 6, 1972, the FBI arrested a fifth employee, Floyd Brown, and charged him also with participation in the March 24 theft. Moore and Lomax are black; Marshall, Clemons, and Brown are white. The four employees who were charged had all previously been under surveillance by the FBI because of informant information that they had been involved in earlier thefts. The charges were subsequently dropped against Moore; Lomax and Clemons were convicted after trial; Brown was acquitted.

RF&P charged all five employees with violating company rules and held hearings on the charges against each employee. At the close of the hearings, Moore, Lomax, Clemons, and Brown were discharged. Marshall was suspended for 29 days and then discharged.

On August 18, 1975, Moore brought this action against his former employer, alleging that he had been discriminatorily discharged on account of his race. He sought reinstatement and back pay. The gravamen of his complaint was that he had been discharged for the theft whereas Marshall, a similarly situated white man, had merely been suspended.

At the trial, an RF&P Superintendent testified as to the rationale behind the handling of Marshall's case. Marshall had been charged not only with the March 24 theft, but also with other violations of company rules in connection with a subsequent incident. The 29-day suspension allowed time to place all of the violations on Marshall's record and thus strengthen the case against him in case he appealed his discharge to the National Railroad Adjustment Board.

Moore argues on appeal that the unequal treatment of Marshall and himself is indistinguishable from the unequal treatment which the Supreme Court found violative of Title

VII in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976). In *McDonald*, however, the district court had dismissed the complaint on the pleadings. Thus, in reviewing the dismissal, the Supreme Court took all of the plaintiff's allegation to be true. It summarized the allegations as follows:

"Fairly read, the complaint asserted that petitioners were discharged for their alleged participation in a misappropriation of cargo entrusted to Santa Fe, but that a fellow employee, likewise implicated, was not so disciplined, and that the reason for the discrepancy in discipline was that the favored employee is Negro while petitioners are white." 427 U.S. at 282-83.

If those allegations were true, the Supreme Court held, then Title VII had been violated. Thus, the Court determined that the district court had erred in dismissing the complaint for failure to state a claim, and remanded the case for further proceedings.

The Judge did not dismiss the present case on the pleadings; rather, he determined after a trial that Moore's discharge was not racially motivated. There was ample evidence to support this determination. Employees Moore and Marshall were not similarly situated. Criminal charges had been brought against the one, but not the other. The FBI had informant information as to Moore, but not as to Marshall. More importantly, Moore and Marshall were not given significantly unequal treatment. They were both discharged, the only difference being that Marshall's discharge was preceded by a 29-day suspension. The reason for this minor difference in treatment was amply explained by the RF&P Superintendent who testified at the trial. The district court's determination that this explanation was valid and was not a cover-up for a racially-motivated decision is reinforced by the fact that Moore and Brown, another white employee, received identical treatment.

We conclude that Moore's discharge was not racially motivated, and thus affirm that dismissal of his Title VII action.